

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
OAKLAND DIVISION

ERIC MOSS,

Plaintiff,

No. C 11-4706 PJH (PR)

vs.

**ORDER OF PARTIAL  
DISMISSAL AND FOR  
SERVICE**

VINCENT CULLEN, et. al.,

Defendants.

Plaintiff, a former state prisoner at San Quentin State Prison, has filed a pro se civil rights complaint under 42 U.S.C. § 1983. Plaintiff's amended complaint was dismissed with leave to amend. Plaintiff has filed a second amended complaint.

**DISCUSSION**

**A. Standard of Review**

Federal courts must engage in a preliminary screening of cases in which prisoners seek redress from a governmental entity or officer or employee of a governmental entity. 28 U.S.C. § 1915A(a). In its review the court must identify any cognizable claims, and dismiss any claims which are frivolous, malicious, fail to state a claim upon which relief may be granted, or seek monetary relief from a defendant who is immune from such relief. *Id.* at 1915A(b)(1), (2). Pro se pleadings must be liberally construed. *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990).

Federal Rule of Civil Procedure 8(a)(2) requires only "a short and plain statement of the claim showing that the pleader is entitled to relief." "Specific facts are not necessary; the statement need only "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests."" *Erickson v. Pardus*, 551 U.S. 89, 93 (2007) (citations omitted). Although in order to state a claim a complaint "does not need detailed factual

1 allegations, . . . a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief'  
2 requires more than labels and conclusions, and a formulaic recitation of the elements of a  
3 cause of action will not do. . . . Factual allegations must be enough to raise a right to relief  
4 above the speculative level." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)  
5 (citations omitted). A complaint must proffer "enough facts to state a claim to relief that is  
6 plausible on its face." *Id.* at 570. The United States Supreme Court has recently explained  
7 the "plausible on its face" standard of *Twombly*: "While legal conclusions can provide the  
8 framework of a complaint, they must be supported by factual allegations. When there are  
9 well-pleaded factual allegations, a court should assume their veracity and then determine  
10 whether they plausibly give rise to an entitlement to relief." *Ashcroft v. Iqbal*, 129 S. Ct.  
11 1937, 1950 (2009).

12 To state a claim under 42 U.S.C. § 1983, a plaintiff must allege two essential  
13 elements: (1) that a right secured by the Constitution or laws of the United States was  
14 violated, and (2) that the alleged deprivation was committed by a person acting under the  
15 color of state law. *West v. Atkins*, 487 U.S. 42, 48 (1988).

#### 16 **B. Legal Claims**

17 Plaintiff is a former California prisoner who formerly was incarcerated at the La  
18 Palma Correctional Center in Eloy, Arizona. The claims against the Arizona defendants  
19 have already been dismissed because venue was not proper. Plaintiff states he has  
20 prostate cancer and received spinal surgery in 2009. He claims that he was transferred  
21 back to California to save the costs of the cancer medical treatment even though there  
22 were top medical facilities available in Arizona. Plaintiff states that the delay in treatment  
23 due to the transfer was detrimental to his health, yet despite being provided several  
24 opportunities to amend, has again failed to describe how his health suffered as a result of  
25 the delay. Therefore, this claim is dismissed.

26 Plaintiff also states when he was transferred back to California to San Quentin in  
27 2010, he was forced to live on an upper bunk despite his medical records indicating that he  
28 needed a lower bunk due to his spinal injuries. Plaintiff states that defendants Nurse

1 Dixon, Lieutenant Footman and Correctional Officers Hecker and Valdez were aware of this  
2 and despite his objections placed him on an upper bunk. Plaintiff fell off the bunk and  
3 further injured his back. Second Amended Complaint at 45. This claim is sufficient to  
4 proceed.

5 Deliberate indifference to serious medical needs violates the Eighth Amendment's  
6 proscription against cruel and unusual punishment. *Estelle v. Gamble*, 429 U.S. 97, 104  
7 (1976); *McGuckin v. Smith*, 974 F.2d 1050, 1059 (9th Cir. 1992), *overruled on other*  
8 *grounds, WMX Technologies, Inc. v. Miller*, 104 F.3d 1133, 1136 (9th Cir. 1997) (en banc).  
9 A determination of "deliberate indifference" involves an examination of two elements: the  
10 seriousness of the prisoner's medical need and the nature of the defendant's response to  
11 that need. *Id.* at 1059.

12 A prison official is deliberately indifferent if he or she knows that a prisoner faces a  
13 substantial risk of serious harm and disregards that risk by failing to take reasonable steps  
14 to abate it. *Farmer v. Brennan*, 511 U.S. 825, 837 (1994). The prison official must not only  
15 "be aware of facts from which the inference could be drawn that a substantial risk of serious  
16 harm exists," but he "must also draw the inference." *Id.* If a prison official should have  
17 been aware of the risk, but was not, then the official has not violated the Eighth  
18 Amendment, no matter how severe the risk. *Gibson v. County of Washoe*, 290 F.3d 1175,  
19 1188 (9th Cir. 2002). "A difference of opinion between a prisoner-patient and prison  
20 medical authorities regarding treatment does not give rise to a § 1983 claim." *Franklin v.*  
21 *Oregon*, 662 F.2d 1337, 1344 (9th Cir. 1981). In addition "mere delay of surgery, without  
22 more, is insufficient to state a claim of deliberate medical indifference.... [Prisoner] would  
23 have no claim for deliberate medical indifference unless the denial was harmful." *Shapely*  
24 *v. Nevada Bd. Of State Prison Comm'rs*, 766 F.2d 404, 407 (9th Cir. 1985).

## 25 26 CONCLUSION

27 1. Plaintiff's claims are **DISMISSED** with prejudice against all defendants except  
28 Nurse Dixon, Lieutenant Footman and Correctional Officers Hecker and Valdez regarding

1 the upper bunk placement.

2 2. The clerk shall issue summons and the United States Marshal shall serve,  
3 without prepayment of fees, copies of the complaint with attachments and copies of this  
4 order on the following defendants: Nurse Dixon, Lieutenant Footman and Correctional  
5 Officers Hecker and Valdez at San Quentin State Prison.

6 3. In order to expedite the resolution of this case, the court orders as follows:

7 a. No later than sixty days from the date of service, defendants shall file a  
8 motion for summary judgment or other dispositive motion. The motion shall be supported  
9 by adequate factual documentation and shall conform in all respects to Federal Rule of  
10 Civil Procedure 56, and shall include as exhibits all records and incident reports stemming  
11 from the events at issue. If defendants are of the opinion that this case cannot be resolved  
12 by summary judgment, they shall so inform the court prior to the date their summary  
13 judgment motion is due. All papers filed with the court shall be promptly served on the  
14 plaintiff.

15 b. At the time the dispositive motion is served, defendants shall also serve,  
16 on a separate paper, the appropriate notice or notices required by *Rand v. Rowland*, 154  
17 F.3d 952, 953-954 (9th Cir. 1998) (en banc), and *Wyatt v. Terhune*, 315 F.3d 1108, 1120 n.  
18 4 (9th Cir. 2003). See *Woods v. Carey*, 684 F.3d 934, 940-941 (9th Cir. 2012) (*Rand*  
19 and *Wyatt* notices must be given at the time motion for summary judgment or motion  
20 to dismiss for nonexhaustion is filed, not earlier); *Rand* at 960 (separate paper  
21 requirement).

22 c. Plaintiff's opposition to the dispositive motion, if any, shall be filed with the  
23 court and served upon defendants no later than thirty days from the date the motion was  
24 served upon him. Plaintiff must read the attached page headed "NOTICE -- WARNING,"  
25 which is provided to him pursuant to *Rand v. Rowland*, 154 F.3d 952, 953-954 (9th Cir.  
26 1998) (en banc), and *Klinge v. Eikenberry*, 849 F.2d 409, 411-12 (9th Cir. 1988).

27 If defendants file an unenumerated motion to dismiss claiming that plaintiff failed to  
28 exhaust his available administrative remedies as required by 42 U.S.C. § 1997e(a), plaintiff

1 should take note of the attached page headed "NOTICE -- WARNING (EXHAUSTION),"

2 which is provided to him as required by *Wyatt v. Terhune*, 315 F.3d 1108, 1120 n. 4 (9th

3 Cir. 2003).

4 d. If defendants wish to file a reply brief, they shall do so no later than fifteen

5 days after the opposition is served upon them.

6 e. The motion shall be deemed submitted as of the date the reply brief is

7 due. No hearing will be held on the motion unless the court so orders at a later date.

8 4. All communications by plaintiff with the court must be served on defendants, or

9 defendants' counsel once counsel has been designated, by mailing a true copy of the

10 document to defendants or defendants' counsel.

11 5. Discovery may be taken in accordance with the Federal Rules of Civil Procedure.

12 No further court order under Federal Rule of Civil Procedure 30(a)(2) is required before the

13 parties may conduct discovery.

14 6. It is plaintiff's responsibility to prosecute this case. Plaintiff must keep the court

15 informed of any change of address by filing a separate paper with the clerk headed "Notice

16 of Change of Address." He also must comply with the court's orders in a timely fashion.

17 Failure to do so may result in the dismissal of this action for failure to prosecute pursuant to

18 Federal Rule of Civil Procedure 41(b).

19 **IT IS SO ORDERED.**

20 Dated: April 2, 2013.

  
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PHYLLIS J. HAMILTON  
United States District Judge

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**NOTICE -- WARNING (SUMMARY JUDGMENT)**

If defendants move for summary judgment, they are seeking to have your case dismissed. A motion for summary judgment under Rule 56 of the Federal Rules of Civil Procedure will, if granted, end your case.

Rule 56 tells you what you must do in order to oppose a motion for summary judgment. Generally, summary judgment must be granted when there is no genuine issue of material fact--that is, if there is no real dispute about any fact that would affect the result of your case, the party who asked for summary judgment is entitled to judgment as a matter of law, which will end your case. When a party you are suing makes a motion for summary judgment that is properly supported by declarations (or other sworn testimony), you cannot simply rely on what your complaint says. Instead, you must set out specific facts in declarations, depositions, answers to interrogatories, or authenticated documents, as provided in Rule 56(e), that contradict the facts shown in the defendant's declarations and documents and show that there is a genuine issue of material fact for trial. If you do not submit your own evidence in opposition, summary judgment, if appropriate, may be entered against you. If summary judgment is granted, your case will be dismissed and there will be no trial.

**NOTICE -- WARNING (EXHAUSTION)**

If defendants file an unenumerated motion to dismiss for failure to exhaust, they are seeking to have your case dismissed. If the motion is granted it will end your case.

You have the right to present any evidence you may have which tends to show that you did exhaust your administrative remedies. Such evidence may be in the form of declarations (statements signed under penalty of perjury) or authenticated documents, that is, documents accompanied by a declaration showing where they came from and why they are authentic, or other sworn papers, such as answers to interrogatories or depositions.

If defendants file a motion to dismiss and it is granted, your case will be dismissed and there will be no trial.